

YALE LAW JOURNAL

Vol. XXX

JUNE, 1921

No. 8

JUDICIAL REVIEW OF ADMINISTRATIVE FINDINGS

NATHAN ISAACS

Professor of Law, University of Pittsburgh Law School

LAW, FACT, AND DISCRETION

That the scope of judicial review has not yet been sufficiently pricked out by judicial decisions to enable us to draw a line around the realm of administrative autonomy is once more illustrated in a recent decision of the Supreme Court in which three of the Justices dissent. In the majority opinion in the case of *Ohio Valley Water Co. v. Ben Avon Borough*,¹ Mr. Justice McReynolds says:

"Looking at the entire opinion [of the Supreme Court of Pennsylvania²], we are compelled to conclude that the Supreme Court interpreted the statute as withholding from the courts power to determine the question of confiscation according to their own independent judgment when the action of the Commission comes to be considered on appeal. . . . Without doubt, the duties of the courts upon appeals under the Act are judicial in character,—not legislative, as in *Prentiss v. Atlantic Coast Line Railroad Co.*³ This is not disputed; but their jurisdiction, as ruled by the Supreme Court [of Pennsylvania], stopped short of *what must be plainly entrusted to some court* in order that there may be due process of law."

Accordingly, the statute under consideration is held unconstitutional. Mr. Justice Brandeis, on the other hand, speaking for the minority, mentions as an "established principle applied in reviewing the findings "of administrative boards" that "*courts will not examine the facts* "further than to determine whether there was substantial evidence to "sustain the order." And to the contention that the rates were confis-

¹ (1920) 253 U. S. 287, 40 Sup. Ct. 527.

² (1918) 260 Pa. 289, 103 Atl. 744.

³ (1908) 211 U. S. 210, 29 Sup. Ct. 67.

catory he replies that this claim rests wholly upon the notion that the property of the company has been undervalued.

"The objections to the valuation made by the company," says he, "raise no question of law, but *concern pure matters of fact*; and the finding of the Commission confirmed by the highest court of the state is conclusive upon this court."

Thus, the majority of the court view the ultimate question involved—a question of valuation—as one of law, the minority as one of fact. A third possibility is that it is one of discretion, the type of question the determination of which is more legislative than judicial in character. This seems to be the view taken by the Supreme Court of Pennsylvania:

"The ascertainment of a fair value of the property for rate-making purposes is not a matter of formulas, but it is a matter which calls for the exercise of a sound and reasonable judgment upon a proper consideration of all relevant facts. The Commission is not bound to adopt any one method to the exclusion of all others. It may take into consideration various methods, and use its judgment as to the extent to which they shall be employed. . . . *Much must be left to the sound discretion of the appraising body*, the tribunal appointed by law and informed by experience, for the discharge of these delicate and complex duties."⁴

Without going into the constitutional question in this case—which is receiving careful consideration in many quarters—it is clear that there is running through the minds of all of the judges the notion that the power of judicial review depends in a measure upon the type of question involved: as to certain classes of question which are non-judicial, courts have no necessary power of review; as to questions of law, they clearly have not only the power but also the duty of review; as to questions of fact, there is some doubt. In the last type of question, all will agree that the finding of an administrative body is entitled to every presumption in its favor; that, on the other hand, it can be upset by showing that it was based on no evidence, or that there was a defect in proceedings in which the conclusion was reached, or that bad faith was involved. The minority opinion in the Ohio Valley Case, however, differs from that of the majority in that the minority considers the finding of a Commission on a question of fact within the scope of its jurisdiction, properly arrived at, as conclusive for all purposes, provided the legislature has made it so. The majority, on the other hand, throw out a suggestion even on this point, not absolutely necessary to their view of the case, that where confiscation is claimed to be the result of a finding, provision must be made for a resort "to a judicial tribunal for determination upon its own independent judgment as to both *law and facts*; otherwise, the order is void, "because in conflict with the due process clause, Fourteenth Amendment." Except for the purpose of applying the due process clause, however, they do not maintain that questions of fact are reviewable.

⁴260 Pa. 308, 103 Atl. 750.

It seems, then, that a great factor in the law of judicial review is the determination of the kind of question involved—whether it be one of law, fact, or discretion. And the determination of this apparently simple preliminary question as to which type is involved in any particular case seems to be so important—though the judges state their various opinions on it as too axiomatic to require discussion—that the outcome of case after case on judicial review will depend upon the courts's inarticulate definition of the words "law," "fact," and "discretion." But this is not all that will depend upon these inarticulate definitions, for upon the presence or absence of judicial review will depend in the last analysis the fate of that growing branch of our legal system to which, in recent years, the name of administrative law has been given.

ADMINISTRATIVE LAW A NEGATIVE CONCEPT

One of the reasons, it is submitted, for the difficulties encountered in attempting to formulate an Anglo-American system of administrative law on the basis of judicial decisions, legislative tendencies, and executive practice, is that the concept "administrative law" is in our system really an aggregate of negative rather than positive propositions. Dicey has wisely presented *Droit Administratif* and the *Rule of Law* as antonyms.⁵ That is to say, what is sometimes called administrative law is simply the absence of restraints of one type or another in the case of officers of the law entrusted with its enforcement. We are dealing with exceptions to the general principle that officers of the law are amenable to all the ordinary rules of law, criminal and civil, which control private citizens in their actions. There may be an impropriety in calling such an approximation to the truth a general principle. For, if it be true that we ordinarily make no distinction between the officer and the private citizen, it is also true that we have reached this condition not by the promulgation of any general principle—not even by the due process clause of the Fifth or Fourteenth Amendment to the federal Constitution—but by that piecemeal, blundering process that has characterized our law in slowly broadening down "from precedent to precedent."

Just as substantive law in other fields has gradually been formed by being precipitated in the interstices of adjective law, so has this general principle, if such it may be called, been formulated as a result of the procedural side of holding an officer responsible for his acts.

Judicial control, is, of course, only one element among the checks that keep administrative officers from forgetting the personal liberty of the citizen in their zeal for the government which they serve. When judicial control is provided, it may be exercised by review, or otherwise. Under the latter head we may include all cases in which the court is not called upon to try either the correctness of a particular decision

⁵ *Law of the Constitution* (8th ed. 1915) ch. 12.

or the mode of trying a particular case, but rather the conduct of the individual officer complained of. The point involved in such cases is a *faute personnelle*, rather than a *faute de service*.⁶ In a certain sense this type of control is not aimed at administrative decisions at all. John Smith is clubbed by Policeman Kelly and the latter is sued on his bond. That this sort of thing blends right into the review of quasi-judicial decisions is beautifully illustrated in Colonel Arthur Wood's little book, *Policeman and Public*,^{6a} the second chapter of which is significantly entitled, The Policeman as Judge.

"It is interesting," says he (p. 28), "to realize that only in free countries is the public protected against this sort of official misconduct, against the overstepping of its rights by public officers. In Germany the policeman is not liable to a citizen whom he wrongfully arrests. In the United States the policeman is protected only in the exercise of his legal duties . . . The law permits him, for instance, to use force, and all the force that is necessary in order to perform his legal duty, but he must be able to demonstrate that it actually was his duty, that force was needed, and that he did not use one ounce more than was absolutely necessary."

Curiously enough—but then not so curiously, after all, if we remember that he has his attention focused on the interests of the policeman and those of the public rather than on those of the individual citizen—the Colonel lapses into a preference for the Prussian scheme of honoring the red band round the cap. "A policeman," he observes, "is '[under our system] apt to be cautious and to refrain from action 'where there is doubt.'" In Europe generally, however, the State or municipality is made liable for wrongful acts of policemen.

Theoretically our officers from policeman to president are creatures of the law and answerable for disobedience to it, both civilly and criminally.⁷ Whole sections of our statute books are devoted to crimes of public officers, imposing a liability over and above that carried by the general criminal law. It is true that our law is not entirely devoid of provisions protecting functionaries acting within the scope of their duties from liability to pay damages, e. g. in slander and other cases in which malice is an essential element.⁸ But we are so far from giving our officers of the law a general immunity that by the practice of requiring official bonds, we have made it quite a simple matter to sue them. Instead of throwing around the individual officer the cloak of state immunity in all cases, we are taking steps toward making the government itself answerable for damages in contract,

⁶ *Id.*, 394, note 2.

^{6a} Yale University Press, 1919.

⁷ *The Floyd Acceptances* (1868, U. S.) 7 Wall. 666; *United States v. Lee* (1882) 106 U. S. 196, 1 Sup. Ct. 240; *Burton v. United States* (1906) 202 U. S. 344, 26 Sup. Ct. 688.

⁸ *Spalding v. Vilas* (1893) 161 U. S. 483, 16 Sup. Ct. 631.

and municipalities suable even in tort in that indefinable and growing portion of their activities known as the non-governmental side—but that is another story.

We may roughly classify the methods other than civil judicial review provided in law and in fact for the checking of the evil propensities of those elected or appointed to office in some such table as the following:

1. Political answerability of officers to those who appoint or elect them, including liability to impeachment, discipline, discharge, recall, "fair criticism," and failure to be re-elected or appointed; control by legislative action; and by administrative review.
2. Civil responsibility to persons damaged by their acts.
3. Liability of officers to criminal prosecution.

TRUE JUDICIAL REVIEW

We are more particularly concerned with true cases of civil judicial review of administrative findings. These we may tabulate as follows:

- (a) Independent attack on administrative decisions, either
 - (x) direct, as on
 - (1) Mandamus
 - (2) Prohibition
 - (3) Quo warranto
 - (3) Certiorari
 - (5) Habeas corpus
 - (6) Injunction
 - (7) Taxpayer's bill or other
 - (8) Specially provided statutory proceedings, or
 - (y) indirect, where a finding of the administrative body is relied on in a suit between two persons.
- (b) True review,
 - (x) where the administrative body applies to the court for enforcement of its decree;
 - (y) where a statute provides for a quasi appeal or error proceedings in courts.

In cases of true review, the point of the rehearing may conceivably be either:

- (a) to reconsider conclusions
 - (x) of law,
 - (y) of fact, or
 - (z) of policy [in which case the court becomes a part of the machinery for the expression of the sovereign will]; or
- (b) to try the trial, *i. e.*, to pass upon
 - (x) the good faith, involving at times the question whether there is any evidence worth considering;
 - (y) the regularity or adequacy of procedure, as tested
 - A. on constitutional grounds,
 - B. on statutory grounds,
 - C. on the basis of self-imposed rules;

- (z) the jurisdiction of the administrative body, as determined
 - A. by the law (constitution and statutes)
 - B. by jurisdictional facts; or
- (c) to reach a conclusion where the administrative has failed to do so, or has reached an erroneous conclusion.⁹

It would certainly be a coincidence, one of the most remarkable in the history of law, if in this haphazard group of devices—and others may be resorted to in special cases—which subjects the officer to the criticism or control of the citizen or of the state, there could be found neither loopholes nor overlappings. As a matter of fact, there are both. To the extent that the individual citizen is at the mercy of the whim or caprice, to say nothing of the honest mistakes, of an officer of the law, I suppose we may be said to have the elements of administrative law in this country. Whether by the progressive surrender of control over administrative officers of one type or another, the possible field for administrative law will eventually be enlarged, and whether within this field, created merely by the negative element of absence of control, particularly judicial review, there will eventually develop a *system* of administrative law of a positive nature, remains to be seen.

LEGAL BASES OF ADMINISTRATIVE AUTONOMY

The subject of administrative law in its present phase, then, is largely a study of the extent to which courts have either never exercised any control over the findings and orders of officers or have ceased to exercise such control, by their voluntary abdication or under the compulsion of constitutional assemblies and legislative bodies.

That there has always been a field in which courts have refused to review administrative findings may be due in a measure to the fact that, as suggested in the first heading above, political answerability of officers has been a sufficient safeguard to prevent abuse of power. The presence of a remedy at the polls has been deemed a sufficient reason for the absence of a cumulative remedy in court. In addition, at least three principles in the law books have in one way or another been held applicable as reasons or excuses for judicial non-interference.

1. The non-suability of the State without its consent;
2. The maxim *Omnia praesumuntur rite esse acta*, and its corollary that the administrative remedies must be exhausted before the court is resorted to;

⁹ That courts which take up a question for any one of these purposes will not always limit themselves to that purpose is illustrated in *Chin Yow v. United States* (1908) 208 U. S. 8, 28 Sup. Ct. 201, where Mr. Justice Holmes raises the question what the court shall do if it finds that the administrative hearing has been defective. Of course, in every case where either discretion or the adequacy of a hearing is discussed, the court necessarily takes into consideration the actual findings of the administrative body and compares them with the facts offered in evidence.

3. The separation of powers, with its corollaries:
 - a. that the court must not interfere with the operation of the other parts of the government;
 - b. that certain decisions are "not judicial" (or not necessarily judicial) in their nature, among them being
 - (x) clearly, those involving the discretion of non-judicial officers,
 - (y) not quite so clearly, those involving determinations of facts by non-judicial officers, and
 - (z) not clearly at all, some determinations of questions of law.

A word may be said of each of these doctrines.

1. The non-suability of the State, which has been strikingly termed "the royal privilege of dishonesty," has, as suggested above, been very much abridged in modern times, though the judgments of courts of claims do not in themselves bind sovereigns. Yet the doctrine has been extended in at least one direction so as to shield the acts of public officers against claims in which the real party in interest is conceived to be the State. In the case of the federal land department, for example, it has helped to build up a system of administrative courts free from the interference of ordinary judicial tribunals.¹⁰ It has long been held that an officer acting within the scope of his authority is immune from actions for damages arising from mistake or mere want of skill.¹¹ There is room for an analogy with the "privilege" of judicial and legislative officers, but a reduction *ad absurdum* is reached in the case of *Fath v. Koepfel*,¹² when a fish inspector is said to be a judicial officer not civilly responsible, "however erroneously, negligently, ignorantly, corruptly, or maliciously he may act."

2. Then there is the doctrine *Omnia praesumuntur rite esse acta*, a convenient bit of Latin with which to excuse an otherwise inexcusable inertia that sometimes characterizes judges as well as other officials. Of course there is a great deal to be said in favor of the respect that the judiciary owes to the co-ordinate branches of the government, and of the public interest in economy of effort and in stability served by the court's refusal to intermeddle with the affairs of public officers except in a very clear case. The presumption of regularity is indulged in even in the case of the proceedings of a private corporation;¹³ it is a

¹⁰ Cf. *Louisiana v. Garfield* (1908) 211 U. S. 70, 29 Sup. Ct. 31; *Oregon v. Hitchcock* (1905) 202 U. S. 60, 26 Sup. Ct. 568.

¹¹ *Cary v. Curtis* (1845, U. S.) 3 How. 236; *Wells v. Roper* (1919) 246 U. S. 335, 38 Sup. Ct. 317; cf. *Seaman v. Patten* (1805, N. Y. Sup. Ct.) 2 Caines 212.

¹² (1888) 72 Wis. 289, 39 N. W. 539. In this case the court not only compared the inspector to a judge, but to a board of health, citing *Raymond v. Fish* (1883) 51 Conn. 80; to an inspector of provisions, citing *Seaman v. Patten*, *supra*; and to a board of pilot commissioners, citing *Downer v. Lent* (1856) 6 Calif. 94.

¹³ *State v. Kupperle* (1869) 44 Mo. 154.

fortiori proper in the case of public officials.¹⁴ Behind it, however, there is room for a *de facto* if not a *de jure* immunity from judicial review—at least in the absence of bad faith.

The presumption is said to be a strong one.¹⁵ In time the courts begin to say it is one that should prevail if there is the slightest doubt as to the correctness of an opposite allegation.¹⁶ And finally, as we shall see, certain findings of the administrative are said to be conclusive.¹⁷ Connected with this doctrine, though related also to the next, we may consider the rule that one may not resort to the courts until he has exhausted his administrative remedies. Though not in itself a ground for making administrative decrees conclusive, it may very well and does lead to situations where the court says that complaint should have been made elsewhere, and some courts have gone even further with the doctrine.

3. It is interesting that the separation of powers as understood in France has fostered administrative law, while as understood in America it has tended to check it. In France, the corollary most readily seen is that the judiciary must not interfere with the business of other departments. With us an almost opposite result is reached, namely, that no branch other than the judiciary should be intrusted with the power of interpreting and applying law.

3a. Our courts have not escaped the force of the non-interference argument entirely. The matter was succinctly put by Chief Justice Taney in the pension case of *Decatur v. Paulding*:¹⁸

"The interference of the courts with the performance of the ordinary duties of the executive departments of the government would be productive of nothing but mischief, and we are quite satisfied that such a power was never intended to be given to them."

Nine years later the famous case of *Luther v. Borden*¹⁹ made it clear that there were certain fields of official action into which the courts did not feel competent to go. The question then was a political one and it was said: "The ordinary course of proceedings in courts of justice must be utterly unfit for the crisis." The question just what

¹⁴ In the *Trade Mark Cases* (1879) 100 U. S. 82, Mr. Justice Miller said: "When this court is called on in the course of the administration of the law to consider whether an Act of Congress or any other department of the government is within the constitutional authority of that department, a due respect for the coordinate branch of this government requires that we shall decide that it has transcended its powers only when that is so plain that we cannot avoid the duty."

¹⁵ *Shurtleff v. United States* (1903) 189 U. S. 311, 23 Sup. Ct. 535; cf. *Young v. Flower* (1893, Sup. Ct.) 3 Misc. 34, 22 N. Y. Supp. 332.

¹⁶ *Jew Ho v. Williamson* (1900, C. C. N. D. Calif.) 103 Fed. 10.

¹⁷ *United States ex rel. Riverside Oil Co. v. Hitchcock* (1903) 190 U. S. 316, 23 Sup. Ct. 698.

¹⁸ (1840, U. S.) 14 Pet. 497.

¹⁹ (1849, U. S.) 7 How. 1.

is within the judicial field and what is not leads us to the last and most important ditch in which the decisive battles of administrative adjudication versus judicial review have been fought.

3b. The expression "not judicial" is extremely vague, and conveniently elastic. Its application to actual questions ranges from the merest truism to the baldest fiction.

It was behind such a fiction that the body of French administrative law grew up, as Alvarez has demonstrated.²⁰ In the beginning of the last century France was code-ridden. As I have demonstrated elsewhere, a code almost invariably begets a generation of glossators,²¹ under whom the law can grow only by fictions. To quote Alvarez:

"They believed that a law underwent no modification until corrected by new enactment regulating the same matter. They did not admit that the law was capable of more or less perceptible transformation through the influence of changes affecting society. More than that, jural changes escaped them when they were manifested by new laws not expressly referring to the civil law. Thus they separated off and even created a systematic contrast between public law, notably administrative law, and private law, without perceiving that administrative law was for the greater part merely a new aspect of private law, whose principles it modified sometimes even more profoundly than many statutes expressly referring to them."

What French jurists did unconsciously—i. e., to close their eyes to the new growth of private law by calling it "administrative"—it seems the administrators of imperial Germany did, perhaps a little more consciously, though bound only by a constitution and not yet by a code. And so our courts, bound by decisions and constitutional clauses to afford due process of law for the protection of life, liberty, and property, have sometimes with a Podsnappian gesture swept a matter aside as "not judicial." And the argument *ab inconvenienti* has been used to prove their assertion just as it has to justify the theory of the French jurists and German administrators.

THE PROCESS OF JUDICIAL ABDICATION

The process by which our courts have receded has at times been a mere awkward retreat, as if the judiciary had been staggered by the immensity of the task of controlling the executive. Yet, it is interesting, in tracing the history of the encounters of the courts with the executive and their retreats, to find a certain similarity in the several encounters recurring so regularly that one may almost lay down a series of principles of judicial surrender. Roughly, when courts find themselves unable or unwilling to cope with a particular class of findings, they resort to the several doctrines outlined above in the order

²⁰ *In Progress of Continental Law in the XIXth Century* (1918) 25, 49, 50.

²¹ *Cf. The Aftermath of Codification* (1920) 45 Am. Bar. Assn. Rep. 524.

mentioned. First they refuse to entertain direct actions against officers; then when the ingenuity of lawyers brings up the same questions collaterally, they invoke the presumption of *rite acta*. Then when the presumption is met with evidence, they are forced to put their refusal to review on the ground of the type of question involved. They readily see in the matter which they wish to leave unreviewed a question of discretion, and leave us to understand that they are, as courts, concerned in such cases only with abuse of discretion amounting to bad faith. At first they either insist or at least imply that they reserve full power to review all findings of "fact" or of "law." A little later they will admit that some of these alleged questions of discretion are questions of fact, and then appealing to their earlier decisions in which it is established that the finding of another department on the points involved is conclusive, they conclude that in certain questions of fact there is no absolute right to a judicial review. Finally, somewhat similar questions are presented for review to the courts in which it is a little harder to refuse to see questions of law. Reluctantly will they concede in some of these cases that the questions are either "mixed" questions, or possibly questions of the "application" of law to particular facts. In other words, the process of judicial retreat has been accomplished behind the barbed wire entanglements of the alleged distinctions among questions of "law," "fact," and "discretion."

In each decade of the last hundred years, we can find at least one type of question added to the list in which the findings of the administrative tribunal are held conclusive. That in each of the several fields in which these decisions occurred, e. g. nuisance, pensions, political matters, customs duties, public lands, licenses, immigration, postal regulations, public utilities, and workmen's compensation, there was little or no tendency to cite the decisions in the other fields, is due in part to the system of water-tight compartments into which our digests had sorted the law.²² Judicial review of administrative acts was not

²² As an indication of the manner in which this subject is scattered in our law and at the same time as an index to the cases, I suggest the comparing of the following titles of the Cyc-Corpus Juris system. As to land department decisions, 32 Cyc. 1019, 1028; patents, 30 Cyc. 898; election contests, 15 Cyc. 425; extradition, 19 Cyc. 99; highway proceedings, 37 Cyc. 125, 131, 148; railroad commissions, 33 Cyc. 52; removal of pauper, 30 Cyc. 1117; homestead allowance, 21 Cyc. 593; disbarment, 6 C. J. 610; court martial, 5 C. J. 361; parliamentary ruling, 29 Cyc. 1692; public improvements, 28 Cyc. 1016; new school district, 35 Cyc. 534; annexation, 28 Cyc. 207; town meeting, 38 Cyc. 618; deportation proceedings, 2 C. J. 1107; special assessment, 28 Cyc. 1243; pensions, 30 Cyc. 1372; removal of school teacher, 35 Cyc. 1095; tax assessment, 37 Cyc. 1079; Workmen's Compensation, special volume.

No attempt is being made in the present study to ascertain the limits of judicial review that have finally been worked out in any of these fields. That work has been done so admirably for several of the fields by Professor Thomas Reed Powell in his articles in (1909) 22 HARV. L. REV. 360, (1911) 24 *id.* 268, 333, 441, that it is to be hoped he will extend his investigation to the other fields. The cases selected here for illustrative purposes are intended only to show the

one of them, hence lawyers and courts concentrated their attention on other phases of the cases before them, but similar conditions produced similar results even without the aid of direct citations.

In passing these cases in review, it must be remembered, of course, that courts have reiterated, regardless of their holding in particular cases, that they had the power to review, or rather to examine for themselves all questions of law affecting the property or other rights of litigants, that they would at least not consider themselves foreclosed on questions of fact by reason of the decision of any administrative officer, and that even in questions of discretion they would always investigate the good faith of the administrative body. We are now prepared to see how these theories have worked out in fact, and to examine the arguments at the turning-point, in a few of the several types of cases.

SPECIFIC ILLUSTRATIONS OF JUDICIAL ABDICATION

In *Van Wormer v. The Mayor*,²³ the act of the board of health of Albany in destroying a building alleged to be a nuisance was upheld against an action of trespass, in spite of the allegation that the board of health was mistaken as to the facts and that it had proceeded irregularly.²⁴ The court seemed to go on the theory that it was dealing with a matter of executive discretion.²⁵ The vital question involved, however, was whether the act of the health officer complained of was the abatement of a nuisance or not. From one point of view, precautions taken for the safeguarding of the public health are purely within the discretion of the officers entrusted with the work. Yet it is inevitable that such officers be required first to pass upon questions of fact. The condition of a particular house at a particular time is a question of fact. And in applying the law to the facts of any particular case, it is equally inevitable that the officer decide a question of law—no matter how simple the question may be—before he acts. Yet the court refused to look into the questions of law and facts involved, the question of nuisance having been “decided by the proper tribunal.”

A few years later the question came up in the federal courts as to whether pension claims could be passed upon finally by administrative officials. Here it is equally obvious that under the Pension Law the questions were principally questions of fact—though here, too, a

beginnings of judicial abdication in connection with the work of several disconnected departments of the government and the return of the judiciary in some of these fields. It is the historical perspective and the mode of growth rather than the “correct rule” in any particular case that is sought.

²³ (1836, N. Y. Sup. Ct.) 15 Wend. 262.

²⁴ Advantage might have been taken of irregular procedure by *certiorari*.

²⁵ “It must be conceded that [these several acts of the legislature] confer upon the board of health very large discretionary powers—among other things concerning the suppression and removal of nuisances” (p. 264).

question of law—the interpretation of a special act in relation to a general one—was involved. In the case before us Story and McLean, JJ., failed to discern any room for discretion and yet, for reasons on which no majority agreed, the court concluded that the matter should be dealt with as one of legislative and executive discretion, and therefore refused to consider it in a judicial review on propositions of law or facts.²⁶

In *Rankin v. Hoyt*,²⁷ the finality of an administrative finding in customs matters (a report of appraisers adopted by the Collector) was upheld. The question again was one of law and of fact rather than discretion, yet the courts felt that the matter was one touching another part of the government so closely that in the absence of a violation of the Constitution, they would not interfere with the manner in which the customs officials proceeded to collect the revenue of the United States. By making the question seem to be one of the mode of procedure, they soothed their consciences somehow into a belief that they were dealing with a matter of official discretion. Yet the case was destined to appear to later readers clearly to involve an administrative decision on a question of fact, involving property rights of a litigant.

In the next decade the Supreme Court of the United States refused to review an appraisal by customs officials. Its reason was partly hesitancy about interfering with an officer in the exercise of his discretion. In this case²⁸ Mr. Justice Campbell quoted the language of Chief Justice Taney in *Decatur v. Paulding*, set out above, with reference to the separation of powers.

The same decade witnessed an attempt to subject the internal dis-

²⁶ *Decatur v. Paulding* (1840, U. S.) 14 Pet. 497. On the finality of the decisions of the Commissioner of Pensions a Pennsylvania court, without going further in fact, called the questions that had been decided by their proper names. In the case of *Stokely v. DeCamp* (1849, Pa.) 2 Grant, 17, it was said: "The Commissioner [of Pensions] with the aid of the Secretary, where it is required, proceeds on an equitable principle, wisely adopted, to do justice to every applicant in the most summary and expeditious manner, thereby avoiding delay, litigation, and strife. They are the exclusive judges of the law and the facts of the case. . . . Granting that the Secretary of War was mistaken, either in the law or the facts of the case, I know of no tribunal that can correct the error, except those that made it, and whether they have the power or the will to do so, cannot be inquired of here. If it is as they say, it is a mistake. . . . We feel assured that much inconvenience will ensue, and more mischief than good, from an unadvised interference with the action of the Department relating to pensions." Until about 1890 this view seemed to prevail in the federal courts. *United States v. Schindler* (1880, C. C. S. D. N. Y.) 10 Fed. 547, 18 Blatch. 227; *Daily v. United States* (1881) 17 Ct. Cl. 144; *Davidson v. United States* (1886) 21 Ct. Cl. 298; *United States v. Raum* (1890, D. C. App.) 7 Mackey, 556. For later cases showing a tendency to recede from this extreme position, see below, note 52.

²⁷ (1846, U. S.) 4 How. 327.

²⁸ *Bartlett v. Kane* (1853, U. S.) 16 How. 263, 272. The court cited *Decatur v. Paulding*, *supra* note 26.

cipline of a governmental department to judicial review. Here the court could easily refuse to consider the questions of law and fact involved and decide that discipline in an organization is a matter of discretion. In *Murray's Lessee v. Hoboken, etc. Co.*,²⁹ a summary process against a treasury official was upheld. The analogy of military law was soon brought before the country by the events of the Civil War. While that law is, after all, primarily a system of discipline within a department, it comes nearer to the continental European notion of administrative law than anything else which we have developed in this country.

During the next ten years several important cases were decided with reference to the licensing power. In one of these the question passed upon by an official was whether A was a proper person to run an intelligence office. Shall we call this a question of law, or fact, or discretion? The California Supreme Court³⁰ decided that the license statute did not give any "affirmative right to a license by any person, "irrespective of the decision of the Board of Supervisors as to his "qualifications." There is justification for the theory that the granting of licenses involving no rights but rather mere privileges within the power of the state to give or withhold, is to be decided by the proper officials as a matter of discretion. And it has generally been so held since.

That the finding of the special tribunal, the Land Office, even in matters which could by their nature be left to a court, is final, was laid down *obiter* a few years later in Mr. Justice Miller's vigorous style in *Johnson v. Towsley*.³¹ He still holds these findings capable of being opened in equity, to correct injustice and wrong founded on fraud, mistake, or other special grounds of equity when private rights are invaded. It was not till 1881, however, that the doctrine that a body other than a court might conclude questions of fact and law in a manner binding upon the litigant was extended to the Land Department of the United States. Though in the preceding year an errone-

²⁹ (1856, U. S.) 18 How. 272. At p. 284, Mr. Justice Curtis says: "There are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the United States, as it may deem proper. . . . Thus it has been repeatedly decided in this class of cases, that upon their trial the acts of executive officers, done under the authority of congress, were conclusive, either upon particular facts involved in the inquiry or upon the whole title." Citing *Foley v. Harrison* (1853, U. S.) 15 How. 433; *Burgess v. Gray* (1853, U. S.) 16 How. 48. "It is true, also, that even in a suit between private persons to try a question of private right, the action of the executive power, upon a matter committed to its determination, by the constitution, and laws, is conclusive." Citing *Luther v. Borden* (1849, U. S.) 7 How. 1; *Doe v. Braden* (1853, U. S.) 16 How. 635.

³⁰ *People ex rel. Hale v. San Francisco* (1862) 20 Calif. 592.

³¹ (1871, U. S.) 13 Wall. 72.

ous decision of the Land Department was declared not binding upon the court, a Land Department decision was now definitely held not reviewable in the courts of the United States.³² Of course in land office matters the government acts in the dual capacity of a grantor and a judge, and the finality of the act of the land officers may be due as much to the one capacity as to the other. On the basis of this decision and numerous others that have since strengthened it, the Land Department has developed a court of its own with a quasi judicial system of its own. In other words, the vacuum created by judicial withdrawal is being filled in this instance by a new administrative law.

Several important developments in the granting of finality to administrative decrees marked the following decade. It is held, for example,³³ that the commissioner of patents has a work judicial in its nature. By statute, however, the right of judicial review is deliberately left open in patent cases. About this time the practice of granting certificates to practitioners in the learned professions is beginning to gain favor throughout the United States. Several interesting cases turn on the question whether the ranking of a medical college as being in "good standing" and the like are judicial in their nature. The courts wisely refrain from entering into these controversies, for fear of "wandering amid the mazes of therapeutics," and so decide that whatever the nature of particular questions presented in particular cases may be, the general process of granting certificates is, like the process of licensing, purely discretionary in its nature.³⁴

But the most significant developments of this decade are connected with the confirming and extending of the old instances of administrative finality, for example, in the granting of licenses;³⁵ customs house appraisals;³⁶ nuisances;³⁷ acts diplomatic or political in nature.³⁸ Judicial support was also given before the end of the decade to the proposition that a contemporary and long continued interpretation of a doubtful statute by a department of the government must be regarded as practically conclusive.³⁹

In the last decade of the nineteenth century, a remarkable series of cases, emancipating the findings of the immigration officials of the United States from judicial review, begins with the case of *Ekin v. United States*⁴⁰ and leads through a series of Chinese exclusion cases to the climax in *United States v. Ju Toy*.⁴¹

³² *Smelting Co. v. Kent* (1881) 104 U. S. 636; cf. *United States v. Schurz* (1880) 102 U. S. 378, 402.

³³ *Butterworth v. Hoe* (1884) 112 U. S. 50, 5 Sup. Ct. 25.

³⁴ *State ex rel. Granville v. Gregory* (1884) 83 Mo. 123, 136.

³⁵ *Lacroix v. County Commissioners* (1882) 50 Conn. 321.

³⁶ *Hilton v. Merritt* (1884) 110 U. S. 97, 3 Sup. Ct. 548.

³⁷ *Fath v. Koepfel*, *supra* note 12; *Train v. Boston Disinfecting Co.* (1887) 144 Mass. 523, 11 N. E. 929.

³⁸ *Jones v. United States* (1890) 137 U. S. 202, 11 Sup. Ct. 80.

³⁹ *United States v. Hill* (1887) 120 U. S. 169, 7 Sup. Ct. 510.

⁴⁰ (1892) 142 U. S. 651, 12 Sup. Ct. 336.

⁴¹ (1905) 198 U. S. 253, 25 Sup. Ct. 644.

In 1904 the Post Office Department comes into its own.⁴² Its findings are held conclusive on facts and strongly presumptive on law, though the department is free to change its mind on the law, even as to matters on which there are contemporary or long-standing administrative interpretations.

The Interstate Commerce Commission, organized in 1887, had for some time been functioning as a court. The road to judicial review had, however, been left open by the statute creating the body and its amendments. The findings of the commission were to carry with them a presumption of correctness. There was nothing final, however, in its conclusions either of law or of fact. In the last two decades, however, particularly in 1912, a remarkable degree of finality has been given to the decisions of this most famous of commissions. In *Interstate Commerce Commission v. Union Pacific Railroad Co.*,⁴³ the Court said what had long been true in effect: that it would not review the findings of the commissioners to see whether it would have made a similar ruling under the same conditions, that it was concerned only with the question of whether the commissioners had proceeded properly. In other words, there would be a "trial of the trial" only, and not of the merits. With the development of public utilities law during the next few years, and particularly with reference to rate-making, including the preliminary questions of valuation, came such decisions as the following: that the court had no power to review the wisdom of administrative officers beyond passing upon questions of due process;⁴⁴ that where there was sufficient evidence to sustain the findings of the Interstate Commerce Commission, there was no question before the court as to the correctness of the findings;⁴⁵ that, in short, the decision of a department of the government was final unless proved arbitrary, and a commission would not be interfered with even when it was alleged that its new ruling would lead to the loss of an investment made on the strength of a prior ruling.⁴⁶

It is considerably easier to-day to uphold a finding of a commission on facts than it was a generation ago as a result of all these decisions, particularly the interstate commerce decisions. Thus in connection with workmen's compensation commissions, which are perhaps the latest of those for whose decisions finality is claimed, a cautious New York judge has laid it down that inasmuch as the court was powerless to criticize, modify, or revoke a conclusion of fact made by an administrative tribunal, it were best that courts avoided temptation's path by refusing to discuss the questions of fact altogether.⁴⁷

⁴² *Houghton v. Payne* (1904) 194 U. S. 88, 24 Sup. Ct. 590; *Bates & Guild Co. v. Payne* (1904) 194 U. S. 106, 24 Sup. Ct. 595; *Public Clearing House v. Coyne* (1904) 194 U. S. 497, 24 Sup. Ct. 789.

⁴³ (1912) 222 U. S. 541, 32 Sup. Ct. 108.

⁴⁴ *New York v. McCall* (1917) 245 U. S. 345, 38 Sup. Ct. 122.

⁴⁵ *L. & N. Ry. v. United States* (1913) 245 U. S. 463, 38 Sup. Ct. 141.

⁴⁶ *Broughem v. Blanton Mfg. Co.* (1919) 249 U. S. 495, 39 Sup. Ct. 363.

⁴⁷ *Rhorer v. Hueber Co.* (1916). 171 App. Div. 156. 156 N. Y. Supp. 003.

THE RETURN OF THE COURTS

In general, it will thus appear that the last three generations have witnessed a progressive abdication by our courts in favor of various administrative bodies. To prophesy, however, on the basis of this development of the last century, that the abdication of the courts will continue, would be rash, for already signs have appeared indicating that they are ready and able to resume their former functions whenever the power of the administrative has been abused. As Mr. Justice Harlan once said:

"The courts have rarely, if ever, felt themselves so constrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice, or were hostile to the fundamental principles devised for the protection of the essential rights of property."

In actual practice, this power has been shown in several of the fields chosen above to illustrate the emancipation of the administrative. Thus the first field described, that of the control of a board of health in the declaration and abatement of nuisances, has been one of the first to be reclaimed. In 1888, as already mentioned, the climax was reached when a fish inspector was, figuratively speaking, elevated to the bench. Three years later the turn of the tide was perceptible in the cases of *Miller v. Horton*⁴⁸ and *Pierson v. Zehr*⁴⁹ holding the decisions of officers as to what constituted a nuisance open to judicial review. In 1895 the Court of Appeals of New York declared that it would not be bound by the finding of a board of health as to what is and what is not a nuisance.⁵⁰ And the fish inspector case has since been overruled in its own state.⁵¹ In the matter of pensions, a veering away from the extreme view that the pension commissioner's word was final was perceived somewhat earlier.⁵² The Chin Yow immigration case reclaims some of the territory surrendered by the court in the matter of Ju Toy.⁵³ A setback is given even customs officials in the tea-test case.⁵⁴ And strangest of all, the Interstate Commerce Commission is told that it has no authority to order railroads to provide tank cars for the transportation of oil.⁵⁵

⁴⁸ (1891) 152 Mass. 540, 26 N. E. 100.

⁴⁹ (1891) 138 Ill. 48, 29 N. E. 854.

⁵⁰ *Health Dept. v. Rector of Trinity Church* (1895) 145 N. Y. 32, 39 N. E. 833; cf. also *Health Dept. v. Massori* (1897) 21 App. Div. 348, 47 N. Y. Supp. 641.

⁵¹ See *Lowe v. Conroy* (1904) 120 Wis. 151, 97 N. W. 942.

⁵² Cf. *United States v. Purdy* (1889, S. D. Ohio) 38 Fed. 902; *United States v. Lalone* (1890, C. C. E. D. Wis.) 44 Fed. 475.

⁵³ Cf. notes 40 and 9, *supra*.

⁵⁴ *Waite v. Macy* (1918) 246 U. S. 606, 38 Sup. Ct. 395.

⁵⁵ *United States & I. C. C. v. P. R. R.* (1916) 242 U. S. 208, 37 Sup. Ct. 95. The most obvious explanation of this case, as compared with the cases up to that time, is that the court felt it was time to check the activities of the I. C. C.

Is the country experiencing a general reaction against leaving important questions of property to the uncontrolled discretion of non-judicial bodies? To answer this question adequately would involve the writing of a history of the due process clauses in relation to current economic theories and the jural postulates of our time. This task will be as difficult as it will be useful. When it is done, it will probably show why the phrase that was almost overlooked in the Fifth Amendment and in our state constitutions, that was surely not thought of as involving "judicial" process as the only "due" process when it was incorporated into the Fourteenth Amendment,⁵⁶ should two score years after its adoption begin to figure in the development of judicial review. When the study is made, it will be interesting to learn from it whether the beginning of the reaction against the finality of administrative findings is a cause or an effect of the prominence of the constitutional clause.

To come back to the Ohio Valley Case with which we started. That decision may well indicate that a halt has been called and courts are about to resume the power of review in yet another field. The question of valuation may be approached as a question of fact or, in view of the various definitions of which "value" is capable, it may appear as a question of law or a question of discretion, or a combination of all of them. Apparently the court felt that it had reached one of those positions where, to use Mr. Justice Harlan's phrase, "acts done by 'government . . . violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights 'of property.'" The due process clause was conceived to be involved. Whatever one may think of this latest case, it throws light on one feature of our judicial history, the power of the court to come back and to take a hand in the decision of matters supposed to have been surrendered by them to the administrative. And it is interesting to see how carefully in its advance the court retraces the very steps it took in its retreat. It now refuses to see the discretion element in such a process as valuation and to its view the finding of the Commission on the subject before it assumes the guise, for the time being, of a "*judicial question*."

⁵⁶ This was laid down in *Murray's Lessee v. The Hoboken Land and Improvement Co.*, *supra* note 29. It must have been impressed on the minds of the people by *Ex parte Milligan* (1866, U. S.) 4 Wall. 2. The 14th Amendment was proclaimed as adopted July 28, 1868.